Petition

81-303

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. ———

STEPHEN E. McNAMARA,

Petitioner,

vs.

BEATRICE M. QUIROZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTIONS PRESENTED

I. Whether the United States Supreme Court decision in Rush v. Savchuck, 444 U.S. 320 (1980), should be applied retroactively to the facts of the instant case, thereby requiring the dismissal of Mr. McNamara's cause of action for want of jurisdiction.

II. Whether Mrs. Quiroz consented to quasi-in-rem jurisdiction and appeared, thereby submitting to the jurisdiction of the Minnesota Court.

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No. ———

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner Stephen E. McNamara respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of Minnesota entered in this proceeding on May 13, 1981.

ORDER BELOW

The Orders of the Minnesota Supreme Court summarily affirming the trial court's decision and denying the petition for reargument appear in the appendix hereto.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 27, 1981. A timely petition for reargu-

ment was denied on May 13, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257 subd. (3).

QUESTIONS PRESENTED

I. Whether the United States Supreme Court decision in *Rush v. Savchuck*, 444 U.S. 320 (1980), should be applied retroactively to the facts of the instant case, thereby requiring the dismissal of Mr. McNamara's cause of action for want of jurisdiction.

II. Whether Mrs. Quiroz consented to quasi-in-rem jurisdiction and appeared, thereby submitting to the jurisdiction of the Minnesota Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5.

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . . .

Amendment 14.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action to recover damages sustained by Stephen E. McNamara as a result of a collision which occurred on May 2, 1976, in Austin, Texas, between a motorcycle ridden by Mr. McNamara, a Minnesota resident, and an

automobile driven by Beatrice M. Quiroz, a resident of Texas.

On June 16, 1977, Mr. McNamara commenced in Minnesota a statutory procedure for the establishment of quasi-in-rem jurisdiction by garnishment of Mrs. Quiroz's insurer's obligation pursuant to Minn. Stat. 571.41, Subdivision 2(b)(2) and (3). The statute required that a hearing be ordered for the purpose of determining whether probable cause existed for the continuation of the garnishment.

A hearing was ordered for June 22, 1977, at which time both parties appeared. In the course of the hearing Mrs. Quiroz, through her attorneys, Ellingson and Grimes and Kendall Ellingson, Esq., agreed conditionally to the establishment of quasi-in-rem jurisdiction. This was specifically stated in a letter of June 22, 1977, written by her attorneys to Mr. McNamara's law firm, which made jurisdiction contingent upon a garnishment disclosure by Allstate Insurance Company showing an obligation to Mrs. Quiroz.

On June 8, 1977, Allstate Insurance Company executed a garnishment disclosure which stated that Allstate owed Mrs. Quiroz a duty to defend any suit arising out of the accident. Upon receiving the garnishment disclosure Mrs. Quiroz's attorneys wrote to the Court on July 12, 1977, and agreed to the establishment of quasi-in-rem jurisdiction in Hennepin County District Court.

In compliance with the Minnesota statute, the appropriate documents were then tendered to the Sheriff of the County wherein Mrs. Quiroz resided and were personally served on her.

Thereafter Mrs. Quiroz participated in this lawsuit. She served upon Mr. McNamara a demand to produce medical reports and medical report authorizations, a Demand for

Production of Statements, a Notice of Taking Depositions dated October 2, 1978, and a Notice of Taking Depositions dated November 10, 1978.

Mrs. Quiroz then changed attorneys and through her new attorneys, Bell & Floren, filed with the Court and served upon Mr. McNamara a Substitution of Attorneys dated February 7, 1979, a Notice of Taking Deposition dated February 7, 1979, and a Notice of Taking Deposition dated May 14, 1979. Numerous depositions were in fact taken by Mrs. Quiroz's attorneys.

The matter came before the District Court, Hennepin County, Fourth Judicial District, Judge Richard J. Kantorowicz, on May 14, 1980, upon the motion of Mrs. Quiroz for an Order dismissing Mr. McNamara's claim on the grounds that (1) the complaint fails to state a claim upon which relief can be granted; (2) the Court lacks personal jurisdiction over Mrs. Quiroz; and (3) the Court lacks jurisdiction because the action is based on quasi-in-rem jurisdiction found in Minn. Stat. 571.41, allegedly in violation of Mrs. Quiroz's right to due process of law. On June 2, 1980, Judge Kantorowitz issued an order dismissing Mr. McNamara's complaint for want of jurisdiction.

The trial Court reasoned that no answer had been filed on behalf of Mrs. Quiroz and that her only appearance was made solely for the purpose of contesting jurisdiction by the motion to dismiss.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of the United States Supreme Court as to the retroactivity of overruling decision, which is a substantial federal question arising under the Constitution upon which the Minnesota Court has rendered an erroneous decision.

Minnesota adopted the *Seider* basis for establishing jurisdiction over non-residents with the enactment of Minn. Stat. 571.41 Subd. 2(b)(2) and (3). In reliance thereon McNamara commenced an action quasi-in-rem on June 16, 1977.

The decision in *Rush v. Savchuck*, 444 U.S. 320 (1980), overruled the above cited statute but was rendered well after the statute of limitations in Texas barred Mr. McNamara's opportunity to bring his suit in that state.

This Court held in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), that such a decision should not be retroactively applied if

1. the decision to be applied established a new principle of law, as by overruling clear past precedent upon which litigants may have relied;
2. the purpose and effect of the rule in question will not be furthered; and
3. substantially inequitable results will occur.

The *Rush* decision overruled clear past precedent. Prior to commencement of McNamara's case *Seider* jurisdiction had both legislative and judicial sanction, which established a clear line of precedent upon which McNamara relied.

See Minichiello v. Rosenberg and *Stevens v. Tyng*, both reported at 410 F.2d 106 (1968), cert. denied 396 U.S. 844 (1968); *Hanover Insurance Company of New York v. Victor*, 287 N.Y.S.2d 424, 234 N.E.2d 459 (1967), cert. denied 393 U.S. 7 (1968).

Furthermore, *Seider* jurisdiction continued to receive the sanction of the U.S. Supreme Court until the decision in *Rush*. *See O'Connor v. Lee-Hy Paving Corp.; Ferruzzo v. Bright Trucking, Inc.; Kotsonis v. Superior Motor Express;* and *Schwartz v. Boston Hospital for Women*, all reported at 579 F.2d 194 (2d Cir. 1978), cert. denied 439 U.S. 1034 (1978).

Retroactive application of *Rush* does not advance due process; rather, it has the effect of divesting McNamara of substantive rights already arisen. When a person has reasonably relied upon existing law and his right is totally nullified by changing the law and applying the change to him, due process is not served. *See Seigel*, 183 N.Y.L.J. 1 (2/26/80); *Great Northern Railway v. Sunburst Oil Refining Co.*, 287 U.S. 358 (1932); *Chevron Oil*, supra.

Retroactive application of *Rush* is inequitable and imposes injustice and hardship upon McNamara. To allow the case to continue will produce a judgment in favor of one party or the other, a result certainly not disfavored by the Court. Application of the *Rush* case to these facts will, however, result in McNamara losing his only available forum, and his claim being forever barred. McNamara suffered very substantial, permanent injuries as a result of this occurrence. Equity and justice demand that the party who caused the injuries be held responsible. The decision of the Minnesota Supreme Court dictates that insurance proceeds

shall not be available to McNamara and Mrs. Quiroz will not be held to account solely because McNamara relied upon a statute enacted by the legislature and numerous cases decided by the Minnesota and United States Supreme Courts to maintain his Minnesota action while his rights in other jurisdictions expired.

The question of the retroactivity of *Rush* is a substantial and unsettled federal question arising under the Constitution, and the Minnesota Supreme Court has rendered an erroneous or at least a doubtful decision on the question.

2. The refusal of the Minnesota Supreme Court to find jurisdiction where it clearly exists constitutes a denial of due process and presents a substantial federal question arising under the Constitution.

The facts as stated demonstrate the unqualified consent by Mrs. Quiroz through her legal counsel to the quasi-in-rem jurisdiction of the Minnesota Court.

The facts also show she subjected herself willingly, again through her attorneys, to personal jurisdiction. Under the Rules of Civil Procedure for the District Courts of the State of Minnesota, "A party appears when he serves or files any paper in the proceeding." Rule 5.01.The decision to "appear" for purposes other than to make a motion to contest the validity of quasi-in-rem jurisdiction subjects a person to the jurisdiction of the court. *Adam v. Saenger,* 303 U.S. 59 (1938); *Maricopa County v. American Petrofina, Inc.,* 322 F.Supp. 467 (N.D. Cal. 1971); *Spearman v. Sterling S.S. Co.,* 171 F.Supp. 287 (E.D.Pa. 1959); *Mississippi Valley Development Corp. v. Colonial Enter-*

prises, 300 Minn. 66, 217 N.W.2d 760 (1974); *Slayton Gun Club v. Town of Shetek,* 286 Minn. 461, 176 N.W.2d 544 (1970); and Restatement, Conflict of Laws 2d, Sec. 33.

The appearance of Mrs. Quiroz coupled with her failure to object to jurisdiction for three years after commencement of the suit satisfies the *International Shoe* test of minimum contacts in this state. *Adam v. Saenger,* supra.

CONCLUSION

McNamara properly acquired quasi-in-rem jurisdiction in an action for compensation for serious, permanent personal injury pursuant to a then-valid statute which had received the sanction of this Court and numerous other courts. Mrs. Quiroz specifically consented to quasi-in-rem jurisdiction and submitted to personal jurisdiction by numerous appearances. Nonetheless the Minnesota Supreme Court summarily affirmed the trial court's determination of lack of jurisdiction.

For the reasons stated a writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

STEPHEN E. McNAMARA,

Appellant,

vs. 51489

BEATRICE M. QUIROZ,

Respondent.

Considered and decided by the court en banc without oral argument.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the order of the Hennepin County District Court, the Honorable Richard J. Kantorowicz, dated June 3, 1980, as amended by his order dated June 10, 1980, be and the same is hereby summarily affirmed pursuant to Rule 136.01(2), Rules of Civil Appellate Procedure. *Rush v. Savchuk,* 444 U.S. 320, 100 S. Ct. 571, 62 L.Ed. 516 (1980).

Dated: February 27, 1981.

BY THE COURT

JAMES T. OTIS
Associate Justice

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINN.

STEPHEN E. McNAMARA,

Appellant,

vs. 51489

BEATRICE M. QUIROZ,

Respondent.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

John McCarthy
Clerk Supreme Court

Opposition

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CLERK

No. 81-303

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

STEPHEN E. McNAMARA,

Petitioner,

vs.

BEATRICE M. QUIROZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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1981—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

QUESTIONS PRESENTED

I. Whether the decision of *Rush vs. Savchuk,* 444 U.S. 320 should be applied to the present facts, thereby requiring the dismissal of the Petitioner's cause of action because of lack of jurisdiction.

II. Does the Due Process Clause allow the State of Minnesota to exercise any jurisdiction over the Respondent?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT OF CASE

This action arises out of an automobile/motorcycle accident which occurred on May 2, 1976, in Austin, Texas. While the Petitioner has made documentation of the facts relative to the accident, the only facts which need be considered on are those subsequent to the commencement of this lawsuit.

On June 16, 1977, the Appellant commenced this action pursuant to Minnesota Statute 571.41 in order to establish quasi in rem jurisdiction over Ms. Quiroz. She was not, nor had she ever been, a resident of the State of

Minnesota. Pursuant to Ch. 571, a hearing was held for the purpose of determining whether probable cause existed for the continuation of the garnishment. Kendall Ellingson appeared on the behalf of the Garnishee, Allstate Insurance Company. On June 20, 1977, The Allstate Insurance Company executed a garnishment disclosure. At that time they stated that the only personal property of Ms. Beatrice M. Quiroz in the possession of Allstate Insurance Company was as follows:

> Beatrice M. Quiroz was an insured under the policy #29 233 829, effective dates 12/01/75 through 12/01/76. Allstate owes Quiroz duty to defend any suit arising out of an accident of May 2, 1976. and must pay any judgment rendered against her up to the policy limits of $50,000 for one person, $100,000 for more than one person, and $25,000 property damage.

Subsequent to that time, various depositions and requests for production were made. However, as indicated by an Affidavit accompanying Respondent's original Motion to Dismiss, Ms. Quiroz has made no appearance on behalf of herself, nor has she personally defended on the merits of the Plaintiff's Complaint by filing an Answer.

On May 2, 1980, a Motion was served upon the Appellant asking for the following relief:

1. To dismiss the action because it failed to state a claim upon which relief could be granted.
2. To dismiss the action on the grounds that the Court lacked personal jurisdiction over the defendant in this matter.
3. To dismiss the action on the grounds that the Court lacks jurisdiction because such jurisdiction

is based on quasi in rem jurisdiction pursuant to Minnesota Statute 571.41, which is violative of the defendant's Due Process of Law.

The Motion was heard before the Honorable Richard J. Kantorowicz on May 14, 1980. On the 2nd day of June, 1980, Judge Kantorowicz dismissed Plaintiff's Complaint for lack of jurisdiction. The lower Court found the facts to fall squarely within those of *Rush vs. Savchuck*, 444 U.S. 320 (1980) and the assertion of quasi-in-rem jurisdiction over the Defendant to be violative of her right to due process. The Court also found that the Defendant had properly asserted the defense of lack of personal jurisdiction and did not waive it by going forward with discovery. (See Appendix A-1)

Prior this Motion in the State of Minnesota, the Respondent brought an action in the State of Texas to recover her property damage in sum of Five Hundred Forty-Six and 56/100 ($546.56) Dollars. On the 15th day of May, 1980, the Appellant, Steven McNamara, tendered into that Court $546.56, said sum being the total amount prayed for by the Respondent in her original Petition. (See Appendix A-2)

SUMMARY OF ARGUMENT

Petitioner has failed to show that the decision below decided an important question of Federal Law which conflicts with the prior decisions of this Court.

I.

THE DECISION BELOW IS CONSISTENT WITH *RUSH VS. SAVCHUK*, 444 U.S. 320 (1980), and *INTERNATIONAL SHOE CO. VS. WASHINGTON*, 326 U.S. 310.

Petitioner questions the application of the decision in *Rush vs. Savchuk*, 444 U.S. 320 (1980), to cases which were pending before the time the decision came down. The question of jurisdiction in this action was raised by a Motion filed in District Court on May 2, 1980, and heard on May 14, 1980. At no time previously had the Respondent made an appearance, nor had she filed an Answer defending on the merits of the case. Judge Kantorowicz in his decision on the May 14 hearing properly applied the law as it exists subsequent to the Supreme Court's *Rush vs. Savchuk*, supra, decision.

However, the Petitioner argues that because he had obtained quasi in rem jurisdiction prior to *Rush vs. Savchuk*, supra, that he should be enttiled to maintain such jurisdiction over the Respondent. The Petitioner refers to *Cheveron Oil Company vs. Huson*, 404 U.S. 97 (1971), which discusses the effect of an overruling decision. Petitioner contends that under *Cheveron* consideration should be given to three factors. The first being whether or not the decision establishes a new principle overruling clear past principle. A review of the present facts shows that such is not the case.

The history of Minnesota Statute 571.41 and quasi in rem jurisdiction in the State of Minnesota is one of conflict and confusion. This Court in its decision of *Rush vs. Savchuk*, 444 U.S. 320, carefully considered the history

of the Minnesota procedure. In the case of *Savchuk v. Rush*, 311 Minn. 480, 245 NW 624 (1976), (*Savchuk I*), the Minnesota Supreme Court first upheld the procedure. However, in 1977 this Court on appeal vacated the judgment and remanded the case for further consideration in light of its decision of *Shaffer vs. Heitner*, 433 U.S. 902 (1977). On remand, the Minnesota Supreme Court held that the quasi-in-rem jurisdiction did comply with the due process standard enunciated in *Shaffer*. Finally, in January of 1980, this Court found that absent the "minimum contacts" required in *International Shoe Co., vs. Washington*, 326 U.S. 310 (1945), no jurisdiction could be extended over non-resident defendants. The *Rush vs. Savchuk*, supra, decision at footnote 13, cites extensively cases which had rejected such a procedure on state law and constitutional grounds. This Court should also note that Minnesota Supreme Court also questioned the constitutionality of the procedure in its own decision in *Savchuk vs. Rush*, 272 N.W.2d 888, at 891, (Savchuk II), when they stated as follows:

> Although *Sieder vs. Roth*-type jurisdiction is undoubtedly the most highly controversial and significant contemporary application of the doctrine of quasi-in-rem jurisdiction it does not appear in the historical discussion in *Shaffer*.[4]
>
> Since *Shaffer*, New York Courts have split over its implications for *Sieder vs. Roth*-type jurisdiction. Several trial Courts have held such jurisdictions to be precluded by *Shaffer: Torres v. Towmotor Division of Caterpillar, Inc.* D.C., 457 F.Supp. 460 (E.D.N.Y. 1977) (cited in *Alford vs. McGaw*, 61 A.D.2d 504, 402 N.Y.S.2d 499 (1978); *Rodriques vs. Wolfe*, 401 N.Y.S.2d 442 (N.Y.Sup. 1978); *At-*

> *tanasio vs. Ferre,* 401 N.Y.S.2d 685 (N.Y.Sup. 1977); *Katz vs. Umansky,* 92 Misc.2d 285, 399 N. Y.S.2d 412 (N.Y.Sup. 1977); *Kennedy vs. Deroker,* 91 Misc.2d 648, 398 N.Y.S.2d 628 (N.Y.Sup. 1977). Other trial courts have held that such jurisdiction does not offend due process. *O'Conner vs. Lee-Hy Paving Corp.,* 437 F.Supp. 994 (E.D.N.Y. 1977), affirmed, 579 F.2d 194 (2d Cir. 1978); *Wallace vs. Target Store, Inc.,* 92 Misc.2d 454, 400 N.Y.S.2d 478 (N.Y.Sup. 1977). Most recently, a New York appellate Court upheld the exercise of *Seider*-type jurisdiction in light of *Shaffer vs. Heitner. Alford vs. McGaw,* 61 A.D.2d 504, 402 N.Y.S.2d 499 (1978).

This should all be considered in light of the fact that at that time only the states of New York, New Hampshire and Minnesota exercised such a procedure to obtain quasi-in-rem jurisdiction.

The second factor considered under *Cheveron* is whether the purpose and effect of *Rush vs. Savchuk* will be furthered by applying the decision to case such as the present case. This Court acknowledged that the *Rush vs. Savchuk* case is merely a reaffirmation of *International Shoe.*

> Here. however, the Defendant has no contacts with the forum and the Due Process Clause "does not contemplate that the State may make a binding judgment against an individual or corporate defendant with which the State has no contacts, ties or relations." *International Shoe Company vs. Washington,* 326 U.S. at 319, 66 S.Ct. at 160. *Rush vs. Savchuk,* 444 U.S. ——.

The present facts demonstrate an absence of those "minimum contacts" between the Respondent and the State of Minnesota. To assert jurisdiction over the Respondent would be contrary not only to the *Rush vs. Savchuk* decision but also to long standing doctrine of *International Shoe.*

Lastly, the Petitioner contends that to apply *Rush* to this case will lead to substantially inequitable results. Petitioner contends that to hold as the Minnesota Court did will allow to wrongdoer to escape responsibility.

While the Minnesota Supreme Court has never made a determination of the merits Petitioner's claim, it should be pointed out that after the Motion to Dismiss was brought and some five months after the *Rush vs. Savchuk,* decision that the Petitioner tendered the sum of Respondent's damages into a Court of Texas. There is question whether it would still have been possible for the Petitioner to present this claim in the Texas Courts. Such tenders in the State of Texas are considered to conclusively admit every fact which the Petitioner would have been obligated to prove in her claim for damages. By tendering the money into the Court, the Petitioner has admitted his negligence in the operation of his motor vehicle in the accident in question. Arguments being made by the Petitioner as to the merits of his claim are moot, and the Petitioner is estopped from arguing the merits because his tender of the amount of damages operates as an admission of his own negligence. See, *State Fair of Texas vs. Seay,* 98 S.W.2d 232. Also *Rancho Camille, S.A. vs. Beachum,* (Tex. Civ. App. 1980) 596 S.W.2d, *Duval County Ranch Company vs. State.* (Tex., 1979) 587 S.W.2d 436.

The Court should also consider legal history of quasi-in-rem jurisdiction during the pendency of Petitioners action in Minnesota.

This cause of action arose out of an accident which occurred in Austin, Texas on May 2, 1976.In September of 1976, Minnesota Supreme Court in *Savchuk (I)* approved the Minnesota Statute 571.41 quasi in-rem jurisdiction.

On June 16, 1977, the Petitioner commenced a statutory proceeding pursuant to Minnesota Statute 571.41, Sub. Div. 2 in order to establish quasi-in-rem jurisdiction. Only eight days later, on the same day, as its decision of *Shaffer vs. Heitner,* the Court vacated the judgment in *Savchuk (I)* and remanded the same to the Minnesota Court for a decision consistent with the decision in the *Shaffer* case. *Savchuk v. Rush,* 433 U.S. 902 (1977). Such a decision certainly raised constitutional questions with regard to the Minnesota procedure. That decision was a matter of public record and available to the Petitioner.

It was not until October 20, 1978, more than five months after the Petitioner contends the statute of limitations ran on his claim in Texas that the Minnesota Court gave new life to the *Sieder vs. Roth* procedure within the State of Minnesota with its decision of *Savchuk (II).*

Petitioner also argues that he is entitled to rely on the various New York cases, which upheld *Sieder vs. Roth*-type procedures in opposition to *Shaffer vs. Heitner.* However, as noted earlier, the Minnesota Court in their own decision of *Savchuk (II),* 272 N.W.2d 888, at page 891, discussed the split in the New York Courts over *Shaffer's* application to *Sieder vs. Roth*-type procedures and in its footnote 4, at 891 stated the Supreme Court had never considered the constitutionality of the procedure. Reliance

on the *Savchuk* cases is not persuasive since those cases and the others in New York have been under attack from the procedure inception and, have, in fact, been rejected by many Courts. *Roberts vs. Russell,* 392 U.S. 293, (1921). Nor can the Petitioner argue that this Court denial of certiorari in those earlier New York cases implies or sanctions the merits of the procedure in those other cases. *Maryland vs. Baltimore Radio Shows, Inc.,* 338 U.S. 912 (1956).

II.

THE RESPONDENT HAS NOT CONSENTED TO ANY JURISDICTION AND TO ALLOW THE STATE OF MINNESOTA TO EXERCISE JURISDICTION WOULD VIOLATE HER RIGHT TO DUE PROCESS.

Petitioner contends that Respondent actions constitute an appearance and made her subject to the jurisdiction of the State of Minnesota. While he cites Rule 5.01 of the Minnesota Rules of Civil Procedure, he completely ignore Rule 4.04(2) and the Minnesota Courts interpretation of that Rule. He also ignores the Trial Court's Memorandum supporting the order to dismiss.

A similar situation was addressed in the first *Savchuk vs. Rush* case, 245 N.W.2d 624 (1976), (Savchuk I) where the Appellant challenged Rule 4.04(2) of the Minnesota Rules of Civil Procedure, which provides in part:

> "When quasi-in-rem jurisdiction is obtained a party defending such an action thereby submits personally to the jurisdiction of the Court. . ."

The Appellants argued that under such a rule a defendant, as one in Ms. Quiroz' position, would find herself

potentially exposed to unlimited personal liability in an action just because the Plaintiff had obtained quasi-in-rem jurisdiction. The Appellant argued that the quasi-in-rem jurisdiction under Rule 4.04(2) was transformed into personal jurisdiction with potential liability extended beyond the policy limits. The same extension of liability under Rule 4.04(2) would result in this case.

In *Savchuk I* the Court observed that where the automobile insurance policy contained a clause requiring the insured to cooperate with the insurer in the defense of a claim, the defendant insured could lose the right to be indemnified by their insurer. See footnote 8, *Savchuk vs. Rush,* 245 N.W.2d 624, at 628. The Court in *Savchuk I* held that the application of Rule 4.04(2) in circumstances such as are present here were violative of due process, and held that in such circumstances the Rule could not be applied. Cited was the case of *Simpson vs. Loehmann,* 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319 (1968), where the issue of the application of a Rule similar to Rule 4.04(2) was raised and where the New York Court refused to apply the Rule in a factually similar situation. The New York Court held that even though the Defendant proceeds with the defense on the merits, he cannot become personally exposed, citing the case of *Forbes vs. Boynton,* 113 N.H. 617, 313 A.2d 129, (1973).

The Minnesota Court in *Savchuk (I),* continued:

> "Basic consideration of fairness underlie our decision the United States Supreme Court has indicated that a defendant must act to purposefully avail himself of the privilege of conducting activities in the forum state before personal jurisdiction over him may be

> properly asserted. (citation omitted). Defendant Rush engaged in no such voluntary activities; personal jurisdiction over him cannot be justified. Plaintiff's reduction of his claim to $50,000, the policy limits, is implicit in recognition of this fact. 245 N.W.2d 624, 629."

With regard to the protection of the Defendant insured from personal exposure, the Minnesota Court in *Savchuk II* stated:

> "...we are obligated to consider the practical relationship between the insurer and the nominal defendant here. The insurer's garnished obligation to respond is complemented by the insured's obligation to cooperate. Our limitation of liability to policy limits protects the named defendant from personal exposure. *Savchuk vs. Rush*, 272 N.W.2d 888, 892.

The Allstate Insurance Company, by processing Ms. Quiroz' case could not subject its insured to personal jurisdiction. Even though the Minnesota Court felt that the quasi-in-rem jurisdiction under Minnesota Statute 571.41, Sub. Div. 2, was Constitutional in both the first and second *Savchuk* cases, it never felt that personal jurisdiction could be acquired over a Defendant by the actions of its insurer. A realistic view of the facts of this case indicates the very nature of the due process problem here. The Allstate Insurance Company was faced with the possible loss of up to $50,000 as a result of Plaintiff's action against its insured, Beatrice Quiroz, in the State of Minnesota. The company was also faced with the possibility that Ms. Quiroz could be held personally liable for the excess over and above her insurance coverage.

The Minnesota Court in reviewing the case of *Simpson vs. Loehmann,* has demonstrated an awareness of the nature of the relationship between the insurer and the insured in situations of this nature. The Respondent has not personally defended on the merits and Allstate has not done so on her behalf. There has been no submission to personal jurisdiction, and as demonstrated in both *Savchuk I* and *Savchuk II* case, this Court could not impose personal jurisdiction on Respondent.

While it might be argued that the Appellant had jurisdiction of the Respondent's property at one time, that does not change the fact that such procedure violates Due Process, and it does not condone sustaining jurisdiction. In the case of *Steele vs. G. D. Searle & Company,* 483 F.2d 339 (5th Cir. 1973) at 348, footnote 25, the Court made the following observation:

> The Supreme Court has made it clear that questions of state power to exercise jurisdiction over a dispute and state authority to apply its own substative law to the resolution of that controversy are distinct. While it is true that no forum can apply any law until it has valid jurisdiction, a state with jurisdiction can be constitutionally precluded by the Due Process and Full Faith and Credit clauses from applying its own law, if it lacks sufficient contact with the parties or the event giving rise to the litigation. (Citations omitted).

The Respondent here has never had the requisite minimum contact with the State of Minnesota. Respondent has not waived her objections to jurisdiction. To allow quasi-in-rem or any other type of jurisdiction would violate the Due Process and Full Faith and Credit clauses of the

Constitution, and would run afoul of the Supreme Court's decision of *Rush vs. Savchuk*, 444 U.S. 320 (1980).

Lastly the Court should consider the Trial Court's finding that the Respondent properly asserted her defenses and that going forward with discovery did not waive those defenses. See *Anderson vs. Mikel Drilling Co.*, 257 Minn. 487, 495-496, 102 N.W.2d 293, 298 (1960).

CONCLUSION

It is clear that the *Sieder vs. Roth* procedure of obtaining quasi-in-rem jurisdiction over a nonresident without "minimum contacts" violates that individual's "due process" rights. The Petitioner contends that he is entitled to sustain jurisdiction over the Respondent. However, he fails to establish that the Courts of Minnesota can maintain such jurisdiction without violating the Respondent's very basic right to "due process of law."

The Petitioner also argues that this Court should consider the hardship on him in balancing the alternatives, that is, the loss of his claim versus the intrusion on Respondent's right to due process. When faced with the same issue in *Rush vs. Savchuk*, this Court affirmatively answered that the "Due Process clause does not contemplate that a state may make binding a judgment.... against an individual or corporate defendant with which the state has no contacts, ties or relations." *Rush*, 100 S.Ct. at 580 citing *International Shoe Company vs. Washington*, 326 U.S. at 319. This Court's decision of *Rush vs. Savchuk*, 444 U.S. 320 (1980) was merely a reaffirmation of the "minimum contacts" doctrine of *International Shoe*. The Minnesota Supreme Court properly applied the long

standing doctrine of "minimum contacts" and summarily affirmed the lower courts dismissal.

For the reasons above, the Respondent requests the Petition for Writ of Certioriari be denied.

Respectfully submitted,

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(612) 483-6300

APPENDIX

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

Stephen E. McNamara,

Plaintiff,

vs.

Beatrice M. Quiroz,

Defendant.

ORDER

FILE NO. 736734

The above-entitled matter came on for hearing before the undersigned, a Judge of this Court, sitting in a Special Term thereof on the 14th day of May, 1980 upon the motion of defendant to dismiss plaintiff's action for lack of jurisdiction.

Robert H. Tennant, Esq. appeared for and on behalf of defendant. Joseph L. Mannikko, Esq. appeared for and on behalf of plaintiff.

The Court, having heard the arguments of counsel, upon all files, records and proceedings herein and being otherwise duly advised in the premises;

IT IS HEREBY ORDERED that plaintiff's complaint be and the same hereby is dismissed for want of jurisdiction.

BY THE COURT:

/s/ RICHARD J. KANTOROWICZ
Judge of District Court

Dated this 2 day of June, 1980.

MEMORANDUM

The facts of the instant case fall squarely within the recent decision of the United States Supreme Court in *Rush v. Savchuk*, 48 U.S.L.W. 4088 (January 21, 1980). In the absence of minimum contacts between defendant and the forum state, the assertion of quasi-in-rem jurisdiction over defendant through the attachment of the contractual obligation of his or her insurer licensed to do business in the state to defend and indemnify the defendant-insured is violative of due process.

The Court further finds that defendant properly asserted the defense of lack of personal jurisdiction pursuant to Minn. R. Civ. P. 12.02 and 12.08 and did not waive it by going forward with discovery. *See Anderson v. Mikel Drilling Co.*, 257 Minn. 487, 495-496, 102 N.W. 2d 293, 298 (1960). No answer has been filed for or on behalf of defendant and defendant's only appearance in this matter was made solely for the purposes of contesting jurisdiction in the present motion to dismiss.

For the foregoing reasons, the Court has granted plaintiff's motion and accordingly this action is dismissed in all respects.

R.J.K.

No. 263,249

BEATRICE QUIROZ
VS.
STEPHEN E. McNAMARA

IN THE 200TH JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

FINAL ORDER OF DISMISSAL

Came on to be heard on the 15th day of May, 1980, Defendant Stephen E. McNamara's Amended Motion to Dismiss. After reviewing the pleadings and hearing the argument of counsel this Court finds that:

On May 15, 1980, Defendant, by and through his attorney of record, tendered into the registry of the Court a check in the amount of Five Hundred Forty Six and 56/100 Dollars ($546.67). said sum being the total amount of damages prayed for by Plaintiff Beatrice Quiroz in her First Amended Original Petition.

It is therefore, ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action be and hereby is dismissed.

SIGNED and ORDERED ENTERED this 21 day of May, 1980.

/s/ JAMES F. DEAR
Judge Presiding